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No. 14-452

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SIDNEY J. GLEASON,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held in this case, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

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OPINION BELOW

The decision of the Kansas Supreme Court is reported, *State v. Gleason*, 329 P.3d 1102 (Kan. 2014), and is reproduced in the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The Kansas Supreme Court decided this case July 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "... nor shall any State deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend. XIV

STATEMENT OF THE CASE

A. Gleason Commits Violent Crimes Less Than A Month After His Release From Prison

The defendant, Sidney Gleason, was convicted in Kansas state court of capital murder and first degree murder for the double-murder of Darren Wornkey and Miki Martinez, and was sentenced to death.

On February 12, 2004, only 14 days after Gleason had been released on parole after serving a little more

than two-and-a-half years in prison for attempted voluntary manslaughter for shooting a man three times, Gleason participated in the robbery and stabbing of Paul Elliott, an elderly man, in Great Bend, Kansas. Gleason was accompanied in the robbery by Damien Thompson, Ricky Galindo, Brittany Fulton, and Mikiala "Miki" Martinez. Pet. App. 12, 15-16, 21.

After the robbery, the conspirators argued among themselves, and the three men grew suspicious of the two women, believing that the women had found money in Elliott's home and were hiding it. Pet. App. 16, 22. At the direction of Thompson, the women were forced to strip to prove they were not hiding any money. Pet. App. 16, 22.

The conspirators also were concerned about the police finding out who committed the robbery. They discussed this possibility and the importance of no one talking to the police. Pet. App. 22. Threats were made against anyone who said anything to the police, with Gleason in particular declaring that "if somebody talked to the cops, somebody would disappear." Pet. App. 22. The men were concerned about both Brittany and Miki, but especially Miki because they did not know her very well. Pet. App. 16.

Investigation of the robbery eventually led police to the two women, and police questioned both Brittany and Miki. When the local news media later reported additional information about the robbery, the men in the group believed that one or both of the women may have assisted the police investigation. Pet. App. 16, 22.

As a result, the men interrogated Brittany and Miki. Although Miki denied saying anything to the

police, the men did not believe her because her story kept changing. Pet. App. 22. Finally, in frustration, Miki threatened to tell the police everything. Pet. App. 22-23. This angered Gleason, and he repeated his statement that if someone talked to the police, someone would disappear. Pet. App. 23.

Thompson, Galindo, and Gleason then discussed what to do. In particular, they discussed Miki. Pet. App. 23. Gleason made a gesture drawing his finger across his throat, suggesting they kill Miki. Pet. App. 23. The men discussed a plan to kill Miki and, if necessary, to kill her boyfriend, Darren Wornkey, too, if he got in the way. Pet. App. 23.

A few days later, on the night of February 20, 2004, Thompson and Gleason drove from Lyons, Kansas, to Great Bend, Kansas, where Miki lived. Both were armed, Thompson with a 9mm pistol and Gleason with a .22 caliber revolver. Pet. App. 23. They made their way to Miki's house and stopped outside. Shortly thereafter, Darren Wornkey and Miki arrived in Darren's jeep and stopped in front of the house. As soon as the jeep parked, Gleason walked to the driver's side and began shooting into the vehicle, hitting Darren several times, killing him, and wounding Miki in the leg. Pet. App. 17-18. Miki got out of the jeep, screaming. Gleason ordered her into the men's car, Pet. App. 17, and the three of them drove out of Great Bend into the country, stopping in a rural area. Pet. App 18.

When they stopped, Gleason, Thompson, and Miki exited the car, and Thompson attempted to shoot Miki, but his gun malfunctioned. Pet. App. 18. Gleason handed the .22 revolver to Thompson and took Thompson's 9mm pistol. Pet. App. 18. Thompson hit

Miki with the revolver, knocking her down, and then attempted to strangle her. Pet. App. 18. While Thompson strangled Miki, Gleason watched and cleared the malfunction in the 9mm pistol. When Thompson gave up his effort to strangle Miki, he took the 9mm weapon from Gleason and shot Miki, so that he and Gleason would be "even" when it came to killing. Pet. App. 19. The two men left the murder scene, but returned a day later to hide Miki's body. Pet. App. 20.

The police investigation soon connected the Elliott robbery to the murder of Darren Wornkey and the disappearance of Miki Martinez. Police questioned several people, eventually focusing on Thompson and Gleason. Both men ultimately were arrested, and charged with capital murder. Pet. App. 13.

Later, Thompson entered a plea agreement with the State, agreeing to lead police to Miki's body and to testify against Gleason in exchange for a reduced charge (first degree premeditated murder instead of capital murder). Pet. App. 13. Thompson eventually received a sentence of life imprisonment with no possibility of parole for 25 years. Pet. App. 14.

Gleason went to trial. The jury convicted Gleason of capital murder, first degree murder, aggravated kidnapping, aggravated robbery, and criminal possession of a firearm.

B. The Sentencing Phase Evidence, Jury Instructions, And Arguments Result In A Death Sentence For Gleason.

In the penalty phase, the State presented two witnesses (a Kansas Bureau of Investigation agent and a state prosecutor) to support the first aggravating factor below, and relied solely on the guilt-phase evidence to support the other three aggravating factors:

1. That Sidney Gleason was previously convicted of a felony in which Sidney Gleason inflicted great bodily harm or disfigurement on another; and

2. That Sidney Gleason knowingly or purposely killed or created a great risk of death to more than one person; and

3. That Sidney Gleason committed the crime in order to avoid or prevent a lawful arrest or prosecution; and

4. That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

Pet. App. 130-131.

Gleason asserted the following factors as mitigation: (1) his impaired capacity to appreciate the criminality of his conduct; (2) his age at the time of the crime; (3) imprisonment was sufficient to protect the public; (4) his codefendant was significantly involved in the crimes; (5) his codefendant received a life sentence with parole eligibility in less than 23 years; (6) his mother

went to prison when he was young; (7) both of his brothers are in custody; (8) when living with his aunt he was obedient and an excellent student; and (9) his family loves him. Pet. App. 131-133.

To support these factors, Gleason presented five witnesses (his mother, his two brothers, his aunt, and a pastor) but no expert or other medical/scientific evidence regarding his alleged lack of capacity. The State did not cross-examine any of Gleason's witnesses at any length (no more than one or two pages of transcript per witness), and did not genuinely contest anything those witnesses said.

At the close of the evidence, the jury was instructed on both aggravating and mitigating circumstances. For aggravating circumstances, the jury was instructed on the four alleged by the State. Pet. App. 130-131. For mitigating circumstances, the jury was instructed on the nine asserted by Gleason, and also as follows:

> Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.
>
> The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case.

> Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Pet. App. 131-133. The jury also was instructed that

> You may further consider as a mitigating circumstance any other aspect of the defendant's character, background or record, and any other aspect of the offense which was *presented* in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.

Id. at 133 (emphasis added).[1]

Kansas does not impose any burden of proof on capital defendants to establish the existence of mitigating circumstances, as the "presented" language in the instruction above makes clear. Pet. App. 100-101 (citing K.S.A. 21-4624(e) and *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)). With respect to burden of proof, the jury was instructed:

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[1] Gleason did not propose a mitigation instruction that included comment on or any language regarding the burden of proof, nor did he object to the primary mitigation instruction in any respect (Instruction No. 7).

> The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.
>
> *****
>
> If you find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence Sidney Gleason to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.
>
> However, if one or more jurors is not persuaded beyond a reasonable doubt on the burden of proof in the paragraph above, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing Sidney Gleason to death. In that event, Sidney Gleason will not be sentenced to death but will be sentenced by the court as otherwise provided by law.

Pet. App. 133-134.

In closing arguments, the State did not genuinely contest the existence of any of Gleason's asserted mitigating factors except his alleged lack of capacity, and instead argued only about the weight they should be given. For instance, with respect to Gleason's age, the participation of his codefendant, his codefendant's

sentence (after a plea bargain), the imprisonment of his mother and brothers, and the love of his family, the State readily conceded those factors. *See, e.g.*, Pet. App. 148 (acknowledging Gleason was 24), 149 ("There's no question about" his codefendant's participation), 149 ("Absolutely. Okay", his codefendant got a life sentence with parole eligibility), 149 ("not a dispute" that Gleason's mother went to prison), 150 ("all three of her sons in custody. No question. They are."), 150 ("Everyone in the world has someone who loves them.")

The only factor the State even arguably challenged was Gleason's capacity to understand his crimes. On that factor, the State responded simply and briefly: "Did you hear any evidence about that?"[2] Pet. App. 148.

Thus, the State's discussion of mitigation generally did not deny the existence of Gleason's evidence but instead argued the *weight* such evidence should be given. For example, the State noted Gleason's age and asked "Is that mitigating in your mind?" *Id.* Or, if life in prison would adequately protect the public, "how much weight do you want to give it?" *Id.* Comparing Gleason to his codefendant, the State observed that the codefendant confessed and led police to the body of Miki Martinez, while Gleason was a "defendant who shot someone, goes to prison for it, gets out and 14 days later robs and stabs an old man, and 23 days later kills two people to keep them silent." *Id.* at 149. The State

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[2] With respect to alleged lack of capacity, Gleason's counsel argued that "It's not a mental illness. It's life. It's life and how he has come to know life over time and the capacity that that has placed him in." Pet. App. 158. Gleason presented no expert or other medical/scientific evidence to support his alleged lack of capacity.

acknowledged that Gleason's brothers were in prison, that Gleason did well when living with his aunt, and that his family loved him, but asked "Does that mitigate his brutal murders?" *Id.* at 150.

Furthermore, the State's closing argument emphasized rather than undermined each juror's role to act individually and independently to consider all mitigating evidence. Indeed, the State began its closing argument by reminding the jury that "you should consider and weigh *everything* admitted into evidence during the guilt or penalty phase that bears on the aggravating or mitigating circumstances." Pet. App. 142 (emphasis added). The State then discussed each of the four aggravating factors it had alleged, *id.* at 143-146, and argued that the State had proven them beyond a reasonable doubt. But the State told the jury that, only if it decided one or more of the aggravating factors had been proven beyond a reasonable doubt would the jury proceed to the next step. *Id.* at 146.

That next step, or the "next instruction" as the prosecutor phrased it, is that, "[y]ou go to the mitigating instruction, and ladies and gentlemen, please take this seriously. This is a man's life that is at stake." Pet. App. 146. The State emphasized that determining mitigating circumstances and whether to exercise mercy is "all up to you. It's to your individual decisions whether or not you want to grant mercy. Your decision." Pet. App. 147. The State went on:

> The determination is your individual choice, which is this section. You don't all have to agree what's mitigating or what's not, and there's no formula for it. You can say this is mitigating. You can say this is mitigating, and I'll give you

> an example in a minute, but it's your individual choice of what to do here.

Pet. App. 147.

After discussing the mitigating evidence, the State reminded the jurors that the State had the burden to prove aggravating factors beyond a reasonable doubt, Pet. App. 150 ("The State has to prove that – the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances ...."), but that with respect to mitigating circumstances, they are to be considered by each juror: "Individually, you put whatever weight you want on the mitigating circumstances individually or collectively or however you want to do it in your own individual minds ...." *Id.*

Defense counsel also emphasized the jurors' obligation to consider mitigating circumstances individually:

> You're also told in that instruction that mitigators do not have to be proven unanimously. You all have to consider them, but if you believe something is a mitigator, it goes on your scale, it doesn't matter if anyone else places it on theirs. Likewise, you independently weigh those mitigators. Give them the weight, 5 pounds, 10 pounds, 15 pounds, whatever you believe appropriate.

Pet. App. 155. Gleason's counsel closed by arguing that "there's a presumption of life in a capital case in Kansas," *id.* at 161, and "[a]ny one of you who says no, I think that there's mitigation, be it mercy, be it something on the list, be it something of your own that

outweighs aggravation guarantees Sidney life." *Id.* at 162.

The jury was given two alternative verdict forms. The first was quite short, and was to be used if "We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict sentencing Sidney Gleason to death." Pet. App. 136.

The second verdict form was two paragraphs. The first paragraph stated that "We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and that they are not outweighed by any mitigating circumstances found to exist." Pet. App. 137. The second paragraph then listed the four aggravating circumstances the State alleged, and provided a box for the jury to check whether it found each aggravator proven beyond a reasonable doubt. *Id.* at 136-137. The second form concluded with the phrase "and so, therefore, unanimously sentence the defendant to death." *Id.* at 137.

The jury completed the second verdict form, explicitly finding that the State had proven the existence of all four aggravating circumstances beyond a reasonable doubt. Pet. App. 137.[3] The jury further found that these aggravating circumstances were not outweighed by any mitigating circumstances, *id.* at

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[3] On appeal, the Kansas Supreme Court concluded that all four aggravating factors were supported by the evidence. Pet. App. 90-92.

136, and unanimously voted to sentence Gleason to death. *Id.* at 137.

C. The Kansas Supreme Court Invalidates Gleason's Death Sentence Because The Jury Was Not Affirmatively Instructed That Mitigating Circumstances Need Not Be Proved Beyond A Reasonable Doubt.

On appeal, the Kansas Supreme Court affirmed Gleason's capital murder conviction, but reversed his death sentence, Pet. App. 12, finding constitutional error in the jury instructions regarding mitigating circumstances. Pet. App. 93-103. Specifically, the Kansas Supreme Court held that the trial court's failure "to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt" violated the Eighth Amendment to the United States Constitution. Pet. App. 103.

1. The Majority Finds An Eighth Amendment Violation.

The Kansas Supreme Court began its discussion by correctly recognizing that the constitutional standard is set forth in *Boyde v. California*, 494 U.S. 370, 380 (1990): "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Pet. App. 94. After briefly discussing the "individualized sentencing" requirement in this Court's cases, *id.* at 94-95, the Kansas court quickly turned to Kansas law and pointed out that the court previously had held that jurors should be informed mitigating circumstances "need to be proved only to the satisfaction of the individual juror in the

juror's sentencing decision and not beyond a reasonable doubt." *Id.* at 96.

The Kansas Supreme Court then opined that this "recommended statement[]" from its prior decisions "implicate[s] the broader Eighth Amendment principle prohibiting barriers that preclude a sentencer's consideration of all relevant mitigating evidence." Pet. App. 99-100. The Kansas court acknowledged that this Court "has explained that its Eighth Amendment jurisprudence on capital sentencing should not be interpreted as creating any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances." *Id.* at 100 (citing *Walton v. Arizona*, 497 U.S. 639, 649-651 (1990)). The Kansas court further recognized this Court's precedents hold that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove ... aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.* (quoting *Walton*, 497 U.S. at 650).

Nevertheless, the Kansas Supreme Court opined that "Kansas' capital sentencing statute differs distinctly from the statute at issue in *Walton*, and that distinction is critical to our analysis here." Pet. App. 100. The "distinction" is that the Kansas "statute is silent as to any burden of proof for mitigating circumstances," *id.* at 101, while the Arizona statute in *Walton* imposed a preponderance of the evidence burden of proof on mitigation. Recognizing, as this Court also has, that "[t]his distinction operates in favor

of Kansas capital defendants," *id.* (quoting *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)), the Kansas court apparently believed that the benefit to defendants is lost unless the jury is explicitly instructed that the mitigating circumstances need not be proven beyond a reasonable doubt.

The Kansas court then concluded that "the instructions as a whole in this case exacerbated rather than cured the instructional error." Pet. App. 102. In particular, the instructions "repeatedly emphasized the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt," but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances." *Id.* In the court's view, the "jury was left to speculate as to the correct burden of proof" and "reasonable jurors *might* have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt." *Id.* (emphasis added). The court held the instructions implicated Gleason's Eighth Amendment right to an individualized sentencing determination and were invalid under the *Boyde* standard. *Id.* at 102-103.

2. The Dissent Finds No Eighth Amendment Violation.

Two justices dissented, because "[t]he majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the circumstances in this case justify a departure from that precedent." Pet. App. 120-121 (Biles, J. dissenting, joined by Moritz, J.). The majority paid "only passing lip service" to the test set forth in *Boyde v. California*, 494 U.S. 370, 380 (1990), before concluding, on "rank

speculation," that an Eighth Amendment violation occurred in this case. *Id.* at 121. The dissent observed:

> The majority's conclusion appears to be that *a per se violation* of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigation evidence need not be proved beyond a reasonable doubt. But this alone cannot justify reversal under controlling Eighth Amendment precedent.

Id. at 121-122.

Identifying "[a] fundamental defect in the majority's analysis" as "its failure to distinguish between the Eighth Amendment's constitutional requirements and the Kansas capital sentencing scheme's statutory requirements," Pet. App. 122, the dissent emphasized that even "the majority acknowledges [its] conclusion is inconsistent with *Walton*, which the majority further admits 'should not be interpreted as creating any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances.'" *Id. (citing Walton,* 497 U.S. at 649-651). The dissent emphasized that the Kansas statute places no burden of proof on mitigation, unlike the Arizona statute in *Walton*, and the dissent was perplexed by the conclusion the majority drew from that distinction: "I fail to see how this distinction is 'critical'—as the majority portrays it—for Eighth Amendment purposes. State law does not define the scope of federal constitutional guarantees." *Id.* at 123.

Pointing out that the majority could only say the instructions "might" or "may" have caused jurors to believe they could not consider mitigating evidence, Pet. App. at 124, the dissent instead analyzed the mitigation evidence presented, the instructions as a whole, and the parties' closing arguments. *Id.* at 124-127. With regard to the evidence, the dissent listed the nine circumstances that Gleason asserted and emphasized that "there was little, if any, dispute about the facts establishing their existence." Pet. App. 124-125. Notably, observed the dissent, the State did not contest the existence of any but possibly one (alleged mental incapacity), instead at most arguing about the weight they should be given. *Id.* at 126.

Looking at the instructions as a whole, the dissent saw "nothing from which to conclude the jury was bewildered by them, or that there is a reasonable likelihood the jurors applied them in a way that prevented their full consideration of Gleason's mitigating factors evidence." *Id.* at 125-126.

Finally, the dissent observed that the "parties' closing arguments further dispel the notion that there is a reasonable likelihood the jury would have applied the instruction in a way that prevented consideration of constitutionally relevant evidence." Pet. App. 126. "In its closing argument, the State repeatedly told the jury it would be each juror's 'individual choice' to decide whether mitigating factors exist based upon 'any evidence' to support a particular factor"; the State "never suggested mitigation had to be proved beyond a reasonable doubt or even under the lower preponderance of the evidence standard." *Id.* Defense counsel, likewise, emphasized that mitigating

circumstances were up to each individual juror to determine, and that any single juror alone could find mercy or some other mitigating circumstance weighed in favor of a life sentence rather than death. Pet. App. 126-127.

Ultimately,

> [t]he instructions, evidence, and arguments of counsel all pointed the jury to do what it was supposed to do in the penalty phase – consider all of the mitigating factors supported by the evidence, as well as mercy for the defendant, and then render a decision on whether the death penalty should be imposed .... There is nothing to show a reasonable likelihood that the jury applied the challenged instructions in a way that prevented consideration of constitutionally relevant evidence.

Pet. App. 127-128. Thus, "the majority's rationale for reversing the sentence fails to conform to Eighth Amendment jurisprudence." *Id.* at 128.

SUMMARY OF THE ARGUMENT

Nothing in this Court's precedents holds that the Eighth Amendment mandates an instruction affirmatively informing a capital sentencing jury that mitigating circumstances are *not* subject to any particular burden of proof. The Constitution only requires that capital sentencing juries be allowed to consider and give effect to all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). So long as the States do not foreclose the consideration of relevant mitigation, they "are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). Thus, to the extent the Kansas Supreme Court held that the Eighth Amendment requires a jury in a capital sentencing proceeding to be *affirmatively instructed* that mitigating circumstances need not be proven beyond a reasonable doubt, that ruling is erroneous.

Even if such an instruction were required as a matter of Kansas law, that circumstance would not establish an Eighth Amendment violation. Instead, the controlling constitutional standard here was articulated in *Boyde v. California*, 494 U.S. 370 (1990), where the Court declared that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* Applying *Boyde* to this case readily demonstrates the Kansas Supreme Court's error.

The *Boyde* Court relied on three factors to decide whether the jury likely understood the instruction to

prevent the consideration of mitigating evidence. *First*, the Court analyzed the language of the instructions and concluded that there was no reasonable likelihood the jurors would have applied the challenged instruction to prevent consideration of any mitigating circumstances. *Id.* at 381-382. *Second*, the Court considered the actual evidence presented, pointing out the defendant had offered considerable mitigating evidence with no opposition from the prosecution. *Id.* at 384. *Third*, the Court considered the arguments of counsel, and pointed out the prosecutor never suggested the mitigation evidence in question could not be considered. *Id.* at 385. Putting these considerations together, the Court concluded there was no reasonable likelihood the jury read the instructions to prevent the consideration of relevant mitigating evidence.

The same conclusion results in this case when the *Boyde* factors are considered. First, the instructions plainly imposed a beyond a reasonable doubt standard on the State to prove both (1) the existence of aggravating factors and (2) that such factors were not outweighed by any mitigation. But the instructions just as plainly did not impose *any* burden of proof on the defendant to prove mitigating circumstances. Indeed, Instruction No. 7 told the jury that it could consider "any" mitigation "which was presented." Pet. App. 133. The instruction said nothing about considering only mitigation which was "proven," much less proven beyond a reasonable doubt.

In *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court made clear that the Eighth Amendment does not require detailed instructions on mitigation, or that any particular requirements for mitigation be included in

the jury instructions. Instead, the Court emphasized that, with respect to mitigation, the Eighth Amendment only requires "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant evidence." 522 U.S. at 276. The Court reiterated that principle in *Weeks v. Angelone*, 528 U.S. 225 (2000).

Thus, the Court's decisions make clear that there is no constitutional requirement that states give detailed instructions on mitigation, that they adopt a particular burden of proof for mitigation, that they give explicit instructions that there is no burden of proof for mitigating circumstances, or that the mitigating circumstances need not be proved beyond a reasonable doubt. State law may address those matters, but the Eighth Amendment does not. Instead, the Eighth Amendment simply requires that the jury be permitted to consider and give effect to all relevant mitigating evidence. The jury instructions in this case satisfied that requirement.

Second, as in *Boyde*, the State here did not genuinely contest the existence of the mitigating circumstances presented. Instead, the State readily conceded all but possibly one of the nine circumstances Gleason asserted, and focused its argument on the *weight* the jury should give the proposed mitigators. Finally, the parties' closing arguments, the third factor under *Boyde*, properly and repeatedly emphasized each juror's role to act individually and independently to consider any and all mitigating evidence, further dispelling any possible perception that mitigation was subject to any burden of proof requirement.

Applying the *Boyde* standard, there was no reasonable likelihood that jurors would have applied the instructions in this case to prevent the consideration of any relevant mitigating evidence, or to prevent them from giving whatever individual effect each juror chose to give such evidence. No reasonable juror would have understood these instructions to require proof of mitigating circumstance beyond a reasonable doubt. The Kansas Supreme Court's holding to the contrary is error.

ARGUMENT

I. The Jury Instructions Did Not Violate The Eighth Amendment.

The Kansas Supreme Court is by no means the first court to address the question presented here. But it is the *only* court in the country to hold that the Eighth Amendment mandates an instruction affirmatively informing the jury that mitigating circumstances need *not* be proven beyond a reasonable doubt. That conclusion is erroneous on its face as a matter of general constitutional principles. Furthermore, in finding a reasonable likelihood that the jurors would have read the instructions here to prevent them from considering all mitigating evidence, the Kansas Supreme Court misapplied the *Boyde* standard.

A. The Eighth Amendment Does Not Require Capital Sentencing Juries To Be Instructed That Mitigating Circumstances Need Not Be Proven By Any Particular Standard.

The Eighth Amendment permits a State to impose the death penalty when a jury finds at least one "aggravating factor" and then finds that "the aggravating factors are not outweighed by mitigating circumstances." *Kansas v. Marsh*, 548 U.S. 163, 165 (2006). This Court has held that States have broad leeway in structuring how mitigating circumstances are presented to, considered, and weighed by the jury.

More specifically, the Constitution requires only that capital sentencing juries be allowed "to consider all relevant mitigating evidence," broadly defined. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *Graham v. Collins*, 506 U.S. 461, 490 (1993) (Thomas,

J., concurring) ("Our early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer."). So long as the States do not foreclose the consideration of relevant mitigation, they "are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006); *Boyde v. California*, 494 U.S. 370, 374 (1990)). Nothing in Kansas law or the instructions given in this case prevented the jury from considering all relevant mitigating evidence here.

The States' "free[dom] to determine the manner in which a jury may consider mitigating evidence" includes the freedom not to assign a burden of proof for mitigating factors. This Court has never held or suggested that the Eighth Amendment requires the States to assign a particular burden of proof for mitigation. *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) ("No Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof."). In fact, the Court has held that States may place the burden upon a criminal defendant to prove the existence of mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 650-651 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002) ("So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances," the State may place the burden to prove mitigation on the defendant.).

The Court likewise has never held or suggested that the Eighth Amendment requires capital sentencing juries to be instructed explicitly and affirmatively that mitigating circumstances need *not* be proven beyond a reasonable doubt. Nor has the Court required an explicit instruction on the lack of any particular burden of proof for mitigation.

The only time such an instruction might be required is where the instructions as a whole otherwise would (*i.e.*, without such an affirmative instruction) create a reasonable likelihood that the jury would understand the instructions to prevent it from considering mitigating circumstances. *Boyde v. California*, 494 U.S. 370 (1990). The instructions here did not create that risk. The Kansas Supreme Court flipped settled constitutional principles on their head when it held that—separate and apart from any purported confusion in the particular instructions given—capital defendants in Kansas suffer constitutional harm when their juries are not instructed explicitly that the mitigating circumstances need *not* be proven beyond a reasonable doubt.

This Court has made clear that the Eighth Amendment does not require that detailed instructions on mitigation be given, or that any particular requirements for mitigation be included in the jury instructions. In *Buchanan v. Angelone*, 522 U.S. 269 (1998), for example, the Court considered and rejected Eighth Amendment challenges to Virginia capital sentencing instructions that neither defined the concept of mitigating evidence nor listed specific categories or examples of mitigating evidence. *Id.* at 272-274. The defendant there argued that the Eighth

Amendment "requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id.* at 275. This Court flatly disagreed: "No such rule has ever been adopted by this Court." *Id.*

The Court emphasized that, with respect to mitigation, the Eighth Amendment requires only "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant evidence." 522 U.S. at 276. Otherwise, "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Id.* After emphasizing the importance of the *Boyde* standard in the context of challenged mitigation instructions, the Court declared that "we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries must consider mitigating evidence." *Id.*

Two years after *Buchanan*, this Court again considered—and again rejected—a challenge to Virginia jury instructions on mitigation. In *Weeks v. Angelone*, 528 U.S. 225 (2000), however, unlike *Buchanan*, the jury was not only instructed to consider any mitigating circumstances but also that "[y]ou must consider a mitigating circumstance if you find there is evidence to support it." *Id.* at 232. The Court concluded that these instructions were even more favorable to the defendant than the instructions upheld in *Buchanan* and, thus, "their sufficiency here follows *a fortiori* from *Buchanan*." *Id.* at 233.

In *Weeks*, the trial judge had answered a question from the jury about the effect of mitigating circumstances by directing the jury to reread its instructions on mitigation, but the defendant challenged that response as error. This Court observed that the "jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answer[ed] its inquiry, the question becomes whether the Constitution requires anything more." 528 U.S. at 234. The Court readily concluded "that it does not." *Id.* Instead, the Court emphasized that a "jury is presumed to follow its instructions," *id.*, and "is presumed to understand a judge's answer to its question." *Id.*

In this case, Gleason's jury never asked the trial court any questions about the instructions, nor did it in any other way indicate or even remotely suggest it had any confusion about the instructions' meaning with respect to mitigation. Moreover, the instructions here were more explicit and favorable to the defendant regarding mitigation than the instructions upheld in *Buchanan*, and at least as favorable as the instructions upheld in *Weeks*.

The Kansas Supreme Court's holding also is undermined by *Kansas v. Marsh*, 548 U.S. 163 (2006). In finding that Kansas' death penalty law satisfies constitutional requirements in *Marsh*, the Court considered, among other things, jury instructions very similar in language and substance to those at issue here. *Compare* Pet. App. 131-133 (jury instructions given here) *with Marsh*, 548 U.S. at 176 (quoting jury instructions given there). The *Marsh* Court observed

that "a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant." 548 U.S. at 176. The Court further noted that "[t]he [Kansas] mercy jury instruction alone forecloses the possibility of *Furman*-type error as it 'eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." 548 U.S. at 176 n.3. In *Marsh*, the Court correctly observed that, under Kansas' law, a defendant "appropriately bears the burden of proffering mitigating circumstances – a burden of production," but never bears a burden of proof. 548 U.S. at 178; *see also* 548 U.S. at 173 ("the Kansas statute ... places no additional evidentiary burden on the capital defendant.").

In the end, the conclusion is inescapable that there is no constitutional requirement that the States give detailed instructions on mitigation, that they adopt a particular burden of proof for mitigation, or that they give explicit instructions that mitigating circumstances need not be proven beyond a reasonable doubt. Instead, the bottom-line constitutional requirement is simply that the jury be permitted to consider and give effect to all relevant mitigating evidence. The jury instructions in this case satisfied that requirement.

The Kansas Supreme Court's largely unexplained and completely unsupported holding to the contrary cannot be squared with this Court's precedent.

B. The Controlling Constitutional Standard For This Case Is Whether There Was A Reasonable Likelihood The Jury Applied The Instructions In A Way That Prevented Consideration Of Mitigating Circumstances.

The controlling constitutional standard here is the one the Court articulated twenty-five years ago in *Boyde v. California*, 494 U.S. 370 (1990), and has applied numerous times since then. In *Boyde*, the Court acknowledged that its prior decisions evaluating jury instructions in capital cases had not always been consistent, 494 U.S. at 378-379, but recognized that "it is important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question." *Id.* at 379.

Like this case, the Court in *Boyde* considered a challenge to "a single jury instruction" that was "not concededly erroneous." *Id.* at 380. Instead, again like this case, the "claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation." *Id.* The Court declared that "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* The Kansas Supreme Court purported to recognize the *Boyde* standard as applicable here, but utterly failed to follow and apply that standard in a way consistent with this Court's precedents.

A review of this Court's analysis in *Boyde* itself demonstrates the Kansas Supreme Court's error. In *Boyde*, a defendant challenged as constitutional error

a California jury instruction on mitigation that did not explicitly reference "background and character" as mitigating evidence but which did inform the jury it could consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." 494 U.S. at 374. In its analysis, the Court relied on three factors to decide whether the jury likely understood the instruction to prevent the consideration of mitigating evidence. Those same factors are all present in this case and were analyzed by the dissenting opinion in the Kansas Supreme Court, but not the majority opinion.

First, the Court in *Boyde* analyzed the language of the instructions and concluded that there was no reasonable likelihood that jurors would have read the challenged instruction to prevent consideration of the defendant's background and character, because such factors obviously may be "circumstance[s] which extenuate[] the gravity of the crime." *Id.* at 381-382. *Second*, the Court considered the evidence presented and the State's response to it, pointing out that the defendant had offered considerable background and character evidence with no opposition from the prosecution: "the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Id.* at 384. *Third*, the Court considered the arguments of counsel, and pointed out that the prosecutor "never suggested that the background and character evidence could not be considered." *Id.* at 385. Instead, he "explicitly assumed that petitioner's character evidence was a proper factor ... but argued that it was minimal in relation to the aggravating circumstances ...." *Id.*

Putting these three considerations together, the Court in *Boyde* concluded that there was no reasonable likelihood the jury read the instructions to prevent the consideration of relevant mitigating evidence. The Court has applied the three factors in other cases challenging mitigation instructions. For example, in *Buchanan v. Angelone*, 522 U.S. 269, 277-279 (1998), the Court first pointed out that the language of the Virginia instructions "did not foreclose the jury's consideration of any mitigating evidence," 522 U.S. at 277, and indeed told the jury to base its decision on "all the evidence." *Id.* Next, the Court observed "there were two days of testimony relating to petitioner's family background and mental and emotional problems," *id.* at 278, concluding that "[i]t is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.'" *Id.* The Court then addressed the third factor: "Further buttressing this conclusion are the extensive arguments of both defense counsel and the prosecutor .... The parties in effect agreed that there was substantial mitigating evidence and that the jury had to weigh that evidence ... in making a discretionary decision ...." *Id.* at 278-279.

The same conclusion results in this case when the *Boyde* factors are considered, as addressed in detail in Section I.C. below.

C. There Is No Reasonable Likelihood The Jury Understood The Instructions Here To Prevent Consideration Of Mitigating Circumstances.

The Kansas Supreme Court's analysis of the jury instructions under the *Boyde* standard is deeply flawed. The instructions here did not impose *any* burden of proof on the defendant to prove mitigating circumstances; they certainly did not impose a "beyond a reasonable doubt" standard. Instead, the instructions as a whole, the evidence presented to the jury, and the arguments of counsel did not create any reasonable likelihood the jury would have understood the instructions to prevent the jury from considering any of the mitigating circumstances unless it found Gleason proved them beyond a reasonable doubt.

1. The Jury Instructions Here Did Not Confuse The Jurors, Nor Preclude Individual Jurors From Considering Any And All Mitigation.

The first *Boyde* factor is to analyze the actual language of the instructions. The instructions here imposed a beyond a reasonable doubt standard on the State to prove both (1) the existence of aggravating factors and (2) that such factors were not outweighed by mitigating circumstances. But the instructions plainly did not impose *any* burden on the defendant to prove mitigating circumstances.

For mitigating circumstances, the jury was instructed on the nine circumstances Gleason asserted, and also told it could consider essentially anything as

mitigation, including "mercy," and do so as individual jurors:

> Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> *****
>
> Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Pet. App. 131-133. Notably, the jury also was instructed that it could consider "any" mitigation "presented":

> You may further consider as a mitigating circumstance *any* other aspect of the defendant's character, background or record, and *any* other aspect of the offense which was *presented* in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death.

Id. at 133 (emphasis added). The jury was never told that it could consider mitigation only if such circumstances were "proven," much less proven beyond a reasonable doubt.

The instructions on their face thus emphasized that the jurors could consider "any" evidence "presented" as possible mitigation, including "mercy," and that such circumstances were "to be determined by each individual juror." Nowhere do the instructions ever suggest that a burden of proof applies to mitigation. To the contrary, the fairest reading of them is that determining and considering mitigation is within the completely unfettered discretion of each individual juror. Indeed, there does not even have to be evidence *at all*, to the extent a juror is willing to exercise mercy. The instructions would permit a juror to vote for a life sentence even if no mitigation evidence was presented, so long as the juror concluded that "mercy" outweighed any aggravating factors found to exist.

Other state supreme courts uniformly have rejected the reading the Kansas Supreme Court gave the jury instructions here. For example, in *People v. Welch*, 976 P.2d 754 (Cal. 1999), the California Supreme Court rejected the rationale the Kansas Supreme Court relied on in this case: "because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors." 976 P.2d at 797.

Likewise, in *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994), the Delaware Supreme Court held that jury instructions that included a "beyond a reasonable doubt" standard for aggravating circumstances but were silent with respect to the burden for mitigating circumstances were not ambiguous and would not be

understood by the jury to prevent consideration of mitigating circumstances unless proven beyond a reasonable doubt. "[I]n the absence of express guidance concerning the proper burden of proof to establish the existence of mitigating circumstances," courts should *not* "assume that the jury applied the same 'beyond a reasonable doubt' standard of proof that it was instructed to use in determining whether the State had established the existence of statutory aggravating circumstances," 637 A.2d at 64-65.

The Indiana Supreme Court also rejected the Kansas Supreme Court's reading of materially indistinguishable instructions in *Matheney v. State*, 688 N.E.2d 883, 902 (Ind. 1997). Indiana places on capital defendants the burden of proving mitigating circumstances by a preponderance of the evidence, but in *Matheny*, the trial court failed to give an instruction on that standard. 688 N.E.2d at 902. The Indiana Supreme Court found no federal constitutional error, observing that "the absence of an instruction so stating, without more, does not necessarily suggest to jurors that mitigating circumstances need be proven beyond a reasonable doubt." 688 N.E.2d at 902. In Indiana, as in Kansas, "[a]ll instructions to a jury on reasonable doubt place that burden on the State." 688 N.E.2d at 902. Thus, "[t]here is no inference in any portion of a trial that defendant's evidence comes under that scrutiny." 688 N.E.2d at 902. Nor might a jury mistakenly assume that a beyond a reasonable doubt standard applies to mitigating circumstances in that context "[w]ithout something specific in the given instructions which would clearly lead a jury to such a misunderstanding." 688 N.E.2d at 902.

In fact, the instructions here are similar in many key respects to instructions the Court upheld against an analogous challenge in *Smith v. Spisak*, 558 U.S. 139 (2010), a federal habeas case. In *Spisak*, the trial court instructed the jury on specific aggravating circumstances, told the jury it had to find such circumstances proven beyond a reasonable doubt, discussed the concept of "mitigating factors," told the jury it could take account of any mitigating factors relevant to sentencing, and then reiterated that the State had the burdens to prove beyond a reasonable doubt (1) the existence of aggravating factors and (2) that any such factors outweighed mitigating factors. *Id.* at 146-147. The instructions did not say that mitigating circumstances had to be found unanimously.

This Court rejected the defendant's argument that the jury might have read the instructions to require jury unanimity with respect to mitigation, pointing out that "the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously." 558 U.S. at 148. "Neither the instructions nor the forms said anything about how—nor even whether—the jury should make individual determinations that each particular mitigating circumstance existed." *Id.* Instead, the instructions and verdict forms (as they did for Gleason here), "focused only on the overall balancing question." *Id.* The Court concluded that "the instructions and verdict forms did not clearly bring about, either through what they said or what they implied," any constitutional error cognizable under AEDPA. *Id.* at 148-149.

Finally, and notably, the United States Military capital sentencing procedures also make no provision for any burden of proof regarding mitigating circumstances, but, like here, they do impose a "beyond a reasonable doubt" standard on aggravating factors. Rule of Court Martial 1004 is the relevant rule. *See, e.g.*, RCM 1004(b)(3) *Evidence in extenuation and mitigation*. ("The accused shall be given broad latitude to present evidence in extenuation and mitigation."); *id.* at (b)(4)(C) *Necessary findings*. ("All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances ...."); *id.* at (b)(6) *Instructions*. (* * * The military judge shall instruct the members that they must consider all evidence in extenuation in mitigation before they may adjudge death."); *cf. id.* at (c) *Aggravating factors*. ("Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors ....").[4]

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[4] Unlike the U.S. military provisions, the rule in federal, non-military, death penalty cases is to explicitly instruct the jury that mitigating circumstances must be established by a preponderance standard. But that rule is imposed by a statutory requirement, not by any decision declaring it to be an Eighth Amendment mandate. *See* 18 U.S.C. § 3593(c) ("The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the evidence of such a factor is established by a preponderance of the information."); Tenth Circuit Pattern Crim. Jury Instr. 3.10 *Mitigating Factors* ("The defendant need only prove mitigating factors by a preponderance of the evidence."); Eighth Circuit Model Crim. Jury Instr. 12.02 *Burden of Proof* ("It is the defendant's burden to establish any mitigating factors, by the [preponderance][greater weight] of the evidence.").

The Kansas Supreme Court stands alone on the question presented. In a jurisdiction like Kansas, which imposes no burden of proof at all on mitigating circumstances, the Kansas Supreme Court's asserted discovery of an Eighth Amendment requirement that juries be affirmatively and explicitly instructed that mitigating circumstances need *not* be proven beyond a reasonable doubt is an outlier. The Kansas Court's misguided attempt to turn this Court's well-settled Eighth Amendment principles on their head is both legally and logically unsupportable.

2. The State Did Not Contest Gleason's Mitigation Evidence, And The Parties' Closing Arguments Properly Emphasized Each Individual Juror's Obligation To Consider Any And All Mitigation.

The second *Boyde* factor to consider in determining whether there was a reasonable likelihood the jury read its instructions to prevent consideration of mitigating circumstances is the mitigation evidence the defendant actually presented and the State's response to that evidence. A third factor, which may well intertwine with the second, is the parties' closing arguments about the evidence and the instructions. Here, Gleason asserted nine factors as mitigation, but the State logically could not have contested any of them except one. In particular, the State could not have contested (and did not contest) factors such as Gleason's age, the participation of his codefendant, his codefendant's sentence, the imprisonment of his mother and brothers, and the love of his family. Instead, the State readily conceded those factors. *See, e.g.*, Pet. App. 148 (acknowledging Gleason was 24), 149 ("There's no

question about" his codefendant's participation), 149 ("Absolutely. Okay", his codefendant got a life sentence with parole eligibility), 149 ("not a dispute" that Gleason' mother went to prison), 150 ("all three of her sons in custody. No question. They are."), 150 ("Everyone in the world has someone who loves them.").

The only factor the State even arguably challenged was Gleason's alleged lack of capacity to understand his crimes. On that factor, the State responded simply and briefly: "Did you hear any evidence about that?" Pet. App. 148, a question entirely consistent with the burden of production this Court has recognized a capital defendant in Kansas bears in the penalty phase. *Marsh*, 548 U.S. at 173, 178. And, in fact, Gleason offered *no* expert witness, or any other medical/scientific evidence to support his alleged lack of capacity. Even Gleason's counsel readily acknowledged that Gleason was not claiming mental illness or anything of that nature; instead Gleason was just arguing that his life had included many bad experiences that affected his judgment. Pet. App. 158.

In closing arguments, the third factor under *Boyde*, the State's discussion of mitigation did not deny the existence of Gleason's evidence but instead argued the *weight* such evidence should be given. For example, the State noted Gleason's age and asked "Is that mitigating in your mind?" *Id*. Or, if life in prison would adequately protect the public, "how much weight do you want to give it?" *Id*. Comparing Gleason to his codefendant, the State observed that the codefendant confessed and led police to the body of Miki Martinez, while Gleason was a "defendant who shot someone, goes to prison for it,

gets out and 14 days later robs and stabs an old man, and 23 days later kills two people to keep them silent." *Id.* at 149. The State acknowledged Gleason's brothers were in prison, that Gleason did well when living with his aunt, and his family loved him, but asked "Does that mitigate his brutal murders?" *Id.* at 150.

Further, the parties' closing arguments emphasized rather than undermined each juror's role to act individually and independently to consider all mitigating evidence. Indeed, the State began its closing argument by reminding the jury that "you should consider and weigh *everything* admitted into evidence during the guilt or penalty phase that bears on the aggravating or mitigating circumstances." Pet. App. 142 (emphasis added). The State then discussed each of the four aggravating factors it had alleged, *id.* at 143-146, and argued that the State had proven them beyond a reasonable doubt. But the State told the jury that only if it decided one of more of those factors had been proven beyond a reasonable doubt would the jury proceed to the "next instruction." *Id.* at 146.

That "next instruction" was that "[y]ou go to the mitigating instruction, and ladies and gentlemen, please take this seriously. This is a man's life that is at stake." Pet. App. 146. The State emphasized that determining mitigating circumstances and whether to exercise mercy is "all up to you. It's to your individual decisions whether or not you want to grant mercy. *** Your decision." Pet. App. 147. The State went on:

> The determination is your individual choice, which is this section. You don't all have to agree what's mitigating or what's not, and there's no formula for it. You can say this is mitigating.

> You can say this is mitigating, and I'll give you an example in a minute, but it's your individual choice of what to do here.

Pet. App. 147.

After discussing the mitigating evidence, the State reminded the jurors that the State had the burden to prove aggravating factors beyond a reasonable doubt, Pet. App. 150, but that with respect to mitigating circumstances, they are to be considered by each juror: "Individually, you put whatever weight you want on the mitigating circumstances individually or collectively or however you want to do it in your own individual minds ...." *Id.*

Gleason's counsel also emphasized the jurors' duty to consider mitigating circumstances individually:

> You're also told in that instruction that mitigators do not have to be proven unanimously. You all have to consider them, but if you believe something is a mitigator, it goes on your scale, it doesn't matter if anyone else places it on theirs. Likewise, you independently weigh those mitigators. Give them the weight, 5 pounds, 10 pounds, 15 pounds, whatever you believe appropriate.

Pet. App. 155. His counsel closed by arguing that "there's a presumption of life in a capital case in Kansas," *id.* at 161, and "[a]ny one of you who says no, I think that there's mitigation, be it mercy, be it something on the list, be it something of your own that outweighs aggravation guarantees Sidney life." *Id.* at 162.

Based on the extensive evidence of mitigation actually presented without challenge, and the parties' closing arguments, there simply is no reasonable likelihood that jurors would have understood the instructions in this case to prevent the consideration of mitigating evidence, or to prevent the jurors from giving whatever individual effect each of them chose to give such evidence. The Eighth Amendment requires no more. Certainly, no reasonable juror would have understood these instructions to require proof of mitigating circumstance beyond a reasonable doubt. The Kansas Supreme Court's unique holding to the contrary is legally insupportable and contradicted by the record in this case.

CONCLUSION

The State of Kansas requests that the Court reverse the decision of the Kansas Supreme Court.

Respectfully submitted,

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